APPLICANT:
Marquis Associates, LLC

REQUEST: Rezone .902 acres and 1.486 acres from R1 Urban Residential to B2 Community Business District

HEARING DATE: March 5, 2007

BEFORE THE

ZONING HEARING EXAMINER

FOR HARFORD COUNTY

BOARD OF APPEALS

Case Nos. 124 and 125

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Marquis Associates, LLC

LOCATION: 907 Philadelphia Road, Joppa, Maryland 21085
Tax Map: 65 / Grid: 2B / Parcel: 598
First (1st) Election District

909 Philadelphia Road, Joppa, Maryland 21085
Tax Map: 65 / Grid: 2B / Parcel: 599
First (1st) Election District

ZONING: R1 / Urban Residential District

REQUEST: A request, pursuant to Section 267-12A of the Harford County Code, to rezone parcels containing 0.902 acres and 1.486 acres from a R1/Urban Residential District to B2/Community Business District.

TESTIMONY AND EVIDENCE OF RECORD:

These cases, which request that two adjoining parcels under common ownership be rezoned from R1/Urban Residential District to B2/Community Business District, were consolidated for hearing and are herein being treated together.

For the Applicant first testified Jacquelyn Seneschal, who was offered and accepted as an expert in planning and zoning. Ms. Seneschal described the subject parcels as being located on the southwesterly quadrant of the intersection of MD Route 7 and Route 152. The parcels are zoned R1/Urban Residential.

A High's convenience store is located opposite the subject parcels on the north side of MD Route 7; a daycare center is located on the southeast quadrant of the MD Route 7 and Route 152 intersection; the property on the northeast quadrant of the intersection is the site of a proposed commercial subdivision. Immediately adjoining the subject parcels to the west is a motorcycle shop.

Ms. Seneschal identified both MD Route 7 and MD Route 152 as arterial highways. The subject parcels have direct access to MD Route I-95. Offered and accepted as Applicant's Exhibit 8 is a map of the land use pattern of the area. Ms. Seneschal stated that under the 2004 Harford County Land Use Plan the parcels are classified for industrial employment. The 2003 Joppa/Joppatowne Community Plan designates the property for a community center. The MD Route 152 corridor south of I-95 is designated a mixed employment center. The area is generally intended to be an employment area, with supporting services, according to Ms. Seneschal.

An R1 District, according to Ms. Seneschal, generally contains single family residential uses. However, a B2 zoning District is consistent with the Harford County Land Use Plan and the Joppa/Joppatowne Community Plan. The subject parcels are not within the Edgewood Community Revitalization District. The parcels are not within the U.S. Route 40 Revitalization District. These parcels were specifically excluded from those planning districts and there is currently no County plan for redevelopment of the subject parcels.

Ms. Seneschal gave the opinion that the County, during the 1997 and 1998 comprehensive rezoning, was mistaken in not rezoning the parcels to B2. Ms. Seneschal relied upon the Board of Appeals decision in the case of Charles Anderson (Board of Appeals Case No. 082, decided July, 1998), which requested rezoning of 2.24 acres from R1 to B3. The parcel which was the subject of that action is located close to the subject parcels, although somewhat farther south on MD Route 152, between Old Mountain Road and MD Route 152. The Anderson decision, stated Ms. Seneschal, recited the County's assumptions about the area. In that 1998 case, the County representative set forth the County's strategy that the Anderson site was to be subject to a coordinated redevelopment strategy to promote high-end employment. Ms. Seneschal stated that, in fact, such a strategy was not developed, and the area had not been redeveloped as a whole. There are, in fact, no announced plans for a redevelopment strategy, and no attempts have been made to develop one. Therefore, a mistake was made in relying upon a strategy which was never implemented.

Ms. Seneschal's written report summarized the Applicant's argument;

> *"During the comprehensive rezoning of 1997/98, the subject site retained R1 zoning. In 1998 the owner of a site near the subject property requested a rezoning from R1 to B3 (Board of Appeals Case 082 – Anderson). The Hearing Examiner's decision in that case, which was upheld in subsequent appeals, lays out the factual policy basis upon which the R1 zoning district in this general vicinity was retained during the 1997 zoning review."*

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The following language is taken directly from the Decision of the Hearing Examiner (p-3):

> *"Mr. McClune said that even though the property was designated Industrial/ Commercial in 1988 (Master Plan), it is currently designated Industrial/Employment (in the Master Plan) which in his opinion is to promote high end employment opportunities. He stated that this neighborhood was on(e) that required coordinated re-development and that rezoning this parcel on a piecemeal basis to B3 would promote further strip center construction and defeat the purpose of the Industrial/Employment designation."*

On page 4 the Decision goes on to state:

> *"Mr. McClune could not say which zoning classification would ultimately be appropriate for the property and the area(,) reiterating that those considerations were best made after extensive study of the area, surrounding the uses and the needs of the county, what, in short, he described as 'coordinated redevelopment'."*

Ms. Seneschal sums up her argument as follows:

> *"The premise of the County in 1997/8, that this site would be included in a "coordinated redevelopment" program, has failed to come to fruition. Ten years is a sufficient time for the development of such a program, as shown by the other redevelopment efforts implemented by the County. The assumption of the County in 1997/8, that this site would be part of a "coordinated redevelopment" to promote "high-end employment", was a mistake."*

See Page 4 of Applicant's Exhibit No. 2.

According to Ms. Seneschal, during the 2004 comprehensive zoning review (subsequently rejected by County Executive Craig), the Applicant requested a B2 zoning for the subject parcels. The Planning Advisory Board recommended B2 zoning and the Department of Planning and Zoning recommended B2 zoning. The Harford County Council granted the property a RO/Residential Office zoning. Ms. Seneschal noted that no other RO zoning exists in the area. If the legislation had passed, the RO zoning affixed to this property would have constituted spot zoning. Ms. Seneschal identified a series of surrounding and neighboring properties which, during the 2004 comprehensive zoning (subsequently vetoed by the County Executive), would have been granted either B1 or B2 zoning.

Ms. Seneschal described the neighborhood, as she had determined it, in which the subject parcels are located. The neighborhood is shown on Applicant's Exhibit 9 and generally includes property from the south side of Pulaski Highway (US Route 40), Joppa Road to the west to I-95 to the north, and Clayton Road to the east. Applicant's Exhibit 9 sets out a series of changes in the neighborhood, as identified by Ms. Seneschal. Ms. Seneschal stated that she did not choose the CSX rail line as the southern boundary because she wanted to include all properties along Route 40 within her neighborhood.

Ms. Seneschal explained in detail why each of the changes identified on her Exhibit No. 9A is, in her opinion, evidence of change in the neighborhood. There have been many changes in the area since 1998. Among those changes is the Fire Hall across MD Route 7 from the subject property which has been given public sewer and as a result now has more social activities.

Ms. Seneschal also identified requested rezonings in the neighborhood defined by her since 1998. The first was the application of 701 Pulaski General Partnership, which was an approved request from R1 to B3. The next was the application of Charles Anderson, discussed above, which was a denied request to change from R1 to B3. Next was an application by 701 Pulaski General Partnership, which was withdrawn by the Applicant.

Ms. Seneschal's opinion is the changes in the neighborhood justify a rezoning to B2. The look of the area has changed, and it is much more commercial than it was in 1997. Furthermore, the location of the subject parcels is not a good location for R1 uses. R1 uses, in fact, would not be supported by the parcels. The only R1 use which Ms. Seneschal finds to be compatible with the subject parcels would allow service or fraternal uses.

Ms. Seneschal disagrees with the neighborhood as found by the Staff Report. That neighborhood, shown on Applicant's Attachment 5, is much too small in Ms. Seneschal's opinion.

The witness then reviewed the Limitations, Guides and Standards of § 267-9I. None of these factors, in her opinion, mitigate against the granting of the rezoning request.

Under cross-examination, Ms. Seneschal agreed that all of the properties along Old Mountain Road South are zoned R1. Various properties identified by Ms. Seneschal as being zoned either B1 or B2 had, in fact, been zoned commercial since 1957. Many of the neighborhood changes identified by Ms. Seneschal on her Exhibit 9A are in the U.S. Route 40 redevelopment area. Certain of the changes identified by her are not visible from MD Route 7. A number of the changes had been in existence prior to 1996.

Ms. Seneschal reiterated that, in her opinion, B2 zoning as applied to the subject parcels would be consistent with other uses in the neighborhood. R1 zoning is not appropriate in the industrial/employment land uses category.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune. Mr. McClune disagrees with the Applicant's definition of the neighborhood. The representative believes the actual neighborhood is much smaller than that defined by the Applicant. The neighborhood is defined by the Department as that area which is most directly impacted by the rezoning request. Areas as far away as Oak Avenue Rubble Fill will not be impacted, and should not be included in the neighborhood. The CSX rail line is a natural boundary. It is a boundary of the Commercial Revitalization District. Generally, the neighborhood as defined by the Department extends 2,000 feet from the subject parcels to the west, and 1,000 feet to the east, to I-95 to the north and CSX rail line to the south. This area contains the properties most likely to be impacted by the request.

The Department has found no development within the neighborhood, as defined by the Department, which is not consistent with existing and approved zoning.

The Department finds no mistake. The property lies outside the Commercial Revitalization District.

Mr. McClune notes that the Planning Advisory Board has recommended against the proposed rezoning. R1 zoning is not inconsistent with the neighborhood as defined by the Department. Mr. McClune states that coordinated development is still necessary along MD Route 7.

Next in opposition testified Judy Rose, a resident of 1215 Old Mountain Road South. Ms. Rose is a 37 year resident of the area. Some 15 to 18 families live on the north side, the Old Mountain Road side, of the CSX Railroad. Approximately 15-18 families also reside on the other side of MD Route 7 on Old Mountain Road.

Ms. Rose is opposed to the requested rezoning. She believes the property should remain R1. Traffic along Old Mountain Road South and Route 7 is bad and getting worse. The proposed use would exacerbate traffic. There are no plans for improvements along MD Route 7. Drainage is bad, the roadways are bad. The increasing commercial uses along Route 7 resulted in increased traffic on a bad roadway. Furthermore, the neighborhood had not supported commercial use in the past and does not believe that commercial use on the subject parcels would be successful.

In opposition next testified Ms. Gross, who has resided at 11 Old Mountain Road South for approximately 56 years. She is the next door neighbor to Ms. Rose.

Ms. Gross identified her neighborhood as a pleasant area in which everyone gets alone. She wants no more business in the area or along MD Route 7. The addition of businesses has changed the character of the area. Many businesses have closed up, and she does not believe the subject parcels should be rezoned commercial. She also believes that Route 40 businesses are not part of her community and should not be included in the neighborhood of the subject parcels.

Next in opposition testified Michael Rose who resides at 1215 Old Mountain Road South. Mr. Rose lives very close to the subject property – about 75 feet south. He identified his neighborhood as a close neighborhood, with everybody knowing and getting along with each other. He disagreed with the boundaries of the neighborhood as expressed by the Applicant, calling it not a neighborhood but an "area".

Mr. Rose identified the triangle of properties lying along Old Mountain Road South of Route 7 as being his neighborhood. He can walk along Mountain Road South and does so regularly. It is safe to walk; traffic on Old Mountain Road South is not a problem. He suggests that rezoning of the subject parcels will increase traffic along Old Mountain Road South.

Next in opposition testified Michael Phipps who resides at 1300 Old Mountain Road South. Mr. Phipps owns two lots across the street from Ms. Rose and Ms. Gross.

Mr. Phipps, a real estate agent, likes the area and its tranquility. There is a lot of privacy. The neighbors are not really visible. He believes the subject parcels, if rezoned to commercial, will have a negative impact on his neighborhood. He does not wish to have the type of uses which could use a B2 property, including a McDonald's. Traffic would increase, noise would increase, debris would increase, all of which would adversely impact the area and his property.

APPLICABLE LAW:

Section 267-12 A. Zoning Reclassifications States:

> *"A. Application initiated by property owner.*
>
> *(1) Any application for a zoning reclassification by a property owner shall be submitted to the Zoning Administrator and shall include:*
>
> *(a) The location and size of the property.*
>
> *(b) A title reference or a description by metes and bounds, courses and distance.*
>
> *(c) The present zoning classification and the classification proposed by the applicant.*
>
> *(d) The names and addresses of all persons, organizations, corporations or groups owning land, any part of which lies within five hundred (500) feet of the property proposed to be reclassified as shown on the current assessment records of the State Department of Assessments and Taxation.*

> *(e) A statement of the grounds for the application, including:*
>
> *[1] A statement as to whether there is an allegation of mistake as to the existing zoning and, if so, the nature of the mistake and facts relied upon to support this allegation.*
>
> *[2] A statement as to whether there is an allegation of substantial change in the character of the neighborhood and, if so, a precise description of such alleged substantial change.*
>
> *(f) A statement as to whether, in the applicant's opinion, the proposed classification is in conformance with the Master Plan and the reasons for the opinion."*

The Applicant requests a change in the zoning of the property. An initial presumption exists which the Board of Appeals must consider in determining whether any such request should be granted:

> *"It is presumed that the original zoning was well planned, and designed to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood changed to an extent which justifies the amendatory action."* See Wakefield v. Kraft, 202 Md. 136 (1953).

It is a "rudimentary" principle of zoning review that there exists a:

> *". . . strong presumption of correctness of the original zoning and a comprehensive rezoning."* See Stratakis v. Beauchamp, 268 Md. 643 (1973).

In considering an:

> *". . . application for reclassification, there must first be a finding of substantial change to the character of the neighborhood or a mistake in the comprehensive plan."* See Hardesty v. Dunphy, 259 Md. 718 (1970).

Furthermore, case law dictates that legally sufficient evidence must exist to show "substantial change" in the character of the neighborhood, and not a "mere change" which may very well fail to rise to the level of being based upon legally sufficient evidence to justify a finding of change to the neighborhood. See, generally, Buckel v. Board of County Commissions of Frederick County, 80 Md. App. 05 (1989)

Harford County Development Regulations Section 267-9I, Limitations, Guides and Standards, is also applicable to this request and will be discussed below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant requests a rezoning from R1/Urban Residential zone to a proposed B2/Business District, of its two parcels located at the southwest corner of the intersection of MD Route 7 and MD Route 152 (Mountain Road). The lands immediately surrounding the intersection are designated with a myriad of zoning classifications, including B3, CI, R1, and B1. The uses along Route 7 are for the most part commercial in nature. The lands immediately to the south of the property along "Old" Mountain Road are zoned R1 and constitute a stable residential neighborhood. In the midst of this clutter of competing and somewhat inconsistent zones and uses lie the parcels of the Applicant.

A change from the subject parcels' present residential to requested commercial zoning would, in fact, allow a wider range of more intensive uses then is now presently allowed and, for that reason, this case was vigorously contested by the neighborhood.

Nevertheless, despite the protestations of the neighbors that allowable B2 uses should not be allowed, and the assertions of the Applicant that allowable B2 uses are, in fact, more in keeping with the neighborhood, the standard to be applied is a much more objective and basic one.

To enable one to be granted a change in zoning, an Applicant must show either that a mistake was made in giving the property its current zoning classification, or a change since the last comprehensive zoning in the neighborhood which contains the subject property has occurred so as to justify a change. These initial findings have little to do with the appropriateness of use for a particular property. Furthermore, a finding of change or mistake does not mandate a change of zoning. It merely permits such a finding.

> "In all individual applications for reclassification, there must first be a finding of substantial change in the character of the neighborhood or a mistake in the Comprehensive Plan. Yet this finding merely *permits* a legislative body to grant the requested rezoning but does not *require* it to do so." (italics in original) See Hardesty v. Dumphy, 259 Md. 718, 271 A.2d 152 (1970)

A mere suggestion of change or mistake is, furthermore, not sufficient to carry the Applicant's case. The burden of proof is a difficult one, and is usually described as being "onerous". See Agnes Lane v. Lucas, 247 Md. 612, 233 A.2d 757 (1967) This burden, of course, lies on the Applicant.

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Initially, the issue of the geographical area which constitutes the neighborhood of the subject parcels must be determined. The neighborhood defined by the Department of Planning and Zoning (adopted by the Protestants), and that of the Applicants differed markedly. The neighborhood as defined by the Applicant extends from I-95 on the north, to Route 40 and significantly below Route 40 to the south, and from Clayton Road and Clayton Business Park on the east, to Joppa Road on the west. This is a fairly large parcel consisting of, perhaps, as much as 100 acres. It includes a major rail line, major traffic arterials, a mixture of residential and commercial usage, and a substantial amount of wooded and apparently unimproved property. (See Applicant's Exhibit No. 9 "Proposed Rezoning of Neighborhood with Associated Changes").

On the other hand, the Department of Planning and Zoning's defined neighborhood is more limited, being essentially that as defined by the Applicant, except that the southern boundary terminates at the CSX Railroad. As a result, the neighborhood as defined by the Department of Planning and Zoning is approximately one-half of the size of that defined by the Applicant.

Unfortunately, and despite the multitude of decisions which have been rendered by the Appellate Courts involving requests for rezonings, no hard and fast rule or standard for the definition of neighborhood has been developed. Case law is replete with references to the concept of the neighborhood being "flexible", one which "varies", one which should not be "precisely and rigidly defined". See Woodlawn Area Citizen's Association v. Board of Commissioners, 241 Md. 187, 216 A.2d 149 (1966). Despite the fundamental need to find a neighborhood in rezoning cases which argue 'change', the actual delineations of a neighborhood obviously is a subjective determination and is highly dependent upon the particular facts of each case and the characteristics of the property under review. It has been found to be error to define a neighborhood as constituting only the subject property. See Sedney v. Lloyd, 44 Md. App. 633, 410 A.2d 616 (1980). It has also been found that a neighborhood which extends out a mile and a half radius from the subject property is too remote. See Goucher College v. DeWolfe, 251 Md. 638, 248 A.2d 379 (1968). Beyond these relatively broad perimeters, it has been found that a description of the neighborhood must be a "reasonable one". See Sedney v. Lloyd, infra.

However, one fairly precise standard has been developed. That standard is that the proposed neighborhood must be shown to be within the "immediate environs of the property under review and, perhaps more pointedly, that the changes which occur in that neighborhood be of such a nature as to have 'affected' its character." See Clayman v. Prince George's County, 266 Md. 409, 292 A.2d 689 (1972). See also DePaul v. Board, 237 Md. 221, 205 A.2d 805 (1965).

Accordingly, the neighborhood cannot be too remote. It must be relatively concise, and must be of such a size so that changes which occur in that neighborhood are near enough to effect the character of the subject property. Changes to properties which do not affect the properties under consideration, accordingly, cannot be found to be part of the neighborhood of the parcels at issue.

The application of such a standard eliminates many of the changes identified by the Applicant. Changes identified by the Applicant as being along the Route 40 corridor, particularly those which the Applicant defines as extending almost 2,500 feet below Route 40, are so remote as to have no impact on the character of the subject parcels. It is further found that the neighborhood as defined by the Department of Planning and Zoning, which is from I-95 to CSX Railroad, and generally from Clayton Road to the east and Joppa Road to the west, properly defines the neighborhood of the subject property. Changes to properties within the Department's defined neighborhood can be seen to have at least the potential of having an affect on the subject parcels, certainly more so than those properties identified by the Applicant which are much farther removed.

The Applicant has identified, on Exhibit 9, even within its restricted neighborhood, a series of 20 changes which the Applicant suggests justify the rezoning requests. Nevertheless, a review of Applicant's Exhibit No. 9 shows that none of those suggested changes are actually rezonings. In fact, only one involved an application for a special exception, which was for a restaurant on a parcel located across MD Route 7 from the subject parcels.[1] All of the remaining changes identified by the Applicant appear to be principally permitted changes, that is, changes which are consistent with and allowed by existing zoning. The construction of commercial and residential structures on parcels which are appropriately zoned for those structures is not a change sufficient to justify a change in zoning.

> "(it is) . . . well settled that changes contemplated prior to the least comprehensive zoning are usually not relevant in determining whether a substantial change has occurred to support the rezoning of property." See Buckel v. Board of County Commissioners, 80 Md. App. 305 (1989), see also Chatham Corp. v. Beltram, 252 Md. 578 (1969).

Changes contemplated at the time of the last comprehensive rezoning are simply not sufficient to justify finding a change in the neighborhood. The neighborhood has not "changed" as a result of the events identified by the Applicant. They are natural, anticipated uses of previously zoned and available land.

All of the changes cited by the Applicant were changes which are presumed to have been contemplated by the County Council at the time of the last comprehensive rezoning. Commercially zoned properties are developed for commercial purposes; residentially zoned parcels were developed for residential purposes. Indeed, even within the much larger neighborhood identified by the Applicant there is only one rezoning recognized, and that is a R1 to B3 parcel located south of Route 40, or almost a half mile from the subject parcel. No reasonable connection between that rezoning and the subject parcels can be found.

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[1] ". . . it has been recognized in Maryland that a special exception use cannot constitute a change in the character of the neighborhood sufficient to justify a classification of adjoining property. . . " See Anderson v. Sawyer, 23 Md App. 612, 329 A.2d 716 (1974). See also Creswell v. Baltimore Aviation Service, Inc., 257 Md. 712, 264 A.2d 838 (1970).

It can accordingly be seen that contemplated changes in the neighborhood do not constitute a change sufficient for rezoning purposes. Nothing other than contemplated change has been identified by the Applicant. Furthermore, increased traffic, subdivision growth, density and related issues are not sufficient by themselves to indicate a change in the character of the neighborhood. See Hardesty v. Dunphy, infra.

While no doubt increased activity has occurred even within the neighborhood as defined by the Department of Planning and Zoning, this finding in and of itself is simply not sufficient grounds for a finding of change. The fact that Route 7 and Route 152 may carry additional vehicles is certainly not something which was unanticipated by the Council at the time of the last comprehensive zoning. Increased traffic and growth is a normal aspect of our County, and something which everyone, including presumably elected officials, are well aware of and anticipate. The cumulative impact of the recognized and expected changes in the area, the neighborhood as defined by the Department of Planning and Zoning, and among those areas which most immediately impact the subject property, were anticipated and expected, and are not sufficient to support a finding of change in the character of the neighborhood or subject property.

Accordingly, the Applicant fails to meet the burden of proof in showing a change in the character of the neighborhood sufficient to justify the rezoning.

Perhaps not being certain that its argument of a change in neighborhood will be persuasive, the Applicant also argues a mistake occurred at the time of the last comprehensive zoning (1997), which retained the parcels' R1 zoning. In support of this argument the Applicant makes a relatively convoluted argument, hopefully accurately summarized as follows:

* During the 1997 Comprehensive Rezoning the properties retained their current R1/Urban Residential zoning.

* In Board of Appeals decision dated July, 1998 involving the Anderson parcel, a close, but not adjacent, parcel for which a rezoning from R1 to B3 was requested (and denied), the testimony of Anthony McClune was summarized. The Department, according to Mr. McClune, believed that the requested rezoning for the Anderson parcel should not be granted, as the Department was unable to say "which zoning classification would ultimately be appropriate for the property and the area", reiterating that those considerations were best made after extensive study of the area and surrounding uses. Mr. McClune described the need for the County to engage in "coordinated development".

* The County enacted a new Master Plan in December 2004, the Route 40 Enterprise Zone, and the designated Route 40 Commercial Revitalization District.

* None of these enactments included a "coordinated redevelopment" of the subject parcels or other parcels in their neighborhood.

* Therefore, according to the Applicant, the County Council in 1997 "*intended* to implement and coordinate a redevelopment program for the property and other parcels similarly situated in this neighborhood." (See Page 7 of Applicant's Brief-italics added)

* Accordingly, Applicant argues that since the County Council did not implement such an anticipated coordinated redevelopment program, the Council's decision in 1997 to retain the existing zoning of the property was in error.

Preliminarily, it should be noted that the 1998 zoning decision in Anderson upon which the Applicant relies, does not state that the Department of Planning and Zoning held the position that the Harford County Council in 1997 "*intended*" to implement a redevelopment program for the property and other parcels similarly situated in the neighborhood. It appears, at best, that during the Anderson case the Department of Planning and Zoning's testimony was that the neighborhood is one that "required coordinated redevelopment". (See Page 3 of Anderson Decision). Furthermore, the Department at that time did not recommended rezoning of the Anderson property and in fact that zoning request was denied. It is important to note that the hearing date in Anderson was May 18, 1998, which was well after the effective date of the 1997 comprehensive zoning, which was December 5, 1997 (Council Bill 97-55).

Furthermore, and perhaps most importantly, there is simply no persuasive evidence, or even evidence which suggests, that the Harford County Council in 1997 made a mistake in allowing the property to retain its current R1 zoning. If, as the Department of Planning and Zoning alleges, the parcel should be part of a comprehensive rezoning of the area, there is no evidence that the County Council in 1997 had such a belief or, if it had such a belief, it was ill-founded. Presumably, such a process could take place during the next succeeding comprehensive zoning, and would have taken place in the year 2005 but for the County Executive veto. Nevertheless, the veto of a proposed comprehensive rezoning which would have given the Applicant its requested zone is not sufficient to support a finding of mistake in original zoning. The recitation of Planning and Zoning Staff testimony in the 1998 Anderson decision, which denied similarly requested relief for a close by parcel, can simply not support a finding of mistake in 1997.

However, the clear incongruity between the existing residential zoning of the property and its designation under the Harford County Master Land Use Plan of "Industrial/Employment" is an obvious source of concern. Residential zoning is simply not consistent with such a land use classification, which is defined as "areas of concentrated manufacturing, distribution, technical, research, office, and other activities generally located on major transportation corridors." It is, accordingly, somewhat difficult to understand the Department of Planning and Zoning's conclusion that "the existing land use generally conforming with the intent of the Master Plan." (See Staff Report Page 3.)

Nevertheless, the designation of the proposed use on the land use plan is only helpful in determining the appropriateness of a particular zoning district. The issue of appropriateness of zoning is not reached until the Applicant is able to make a showing of either change or mistake sufficient to justify a review. The Applicant has not made such a showing.

Furthermore, while the preparation of land use plans include intense and extensive amounts of effort, time and resources, they are nothing more than mere guides in the rezoning process;

> *"Because the master plan does not in and of itself establish either a change or mistake relative to the adoption of the comprehensive zoning map, the master plan recommendation for the subject property, standing alone, can never satisfy the change–mistake requirement. Thus, the plan recommendation, though it will be a factor generally to be considered, serves merely as a guide or non-binding piece of evidence in the applicant's case."*

See Richmarr Holly Hills, Inc. v. American PCS, LP, 117 Md. App. 607 (1997).

> *"It is commonly understood, in Maryland and elsewhere, that Master Plans are guides in the zoning process."*

See Chapman v. Montgomery County Council, 259 Md. 641, 271 A.2d 156 (1970), and People's Council v. Webster, 65 Md. App. 694 (1986).

> *". . . a master plan is only a guide and is not to be confused with a comprehensive zoning, zoning map or zoning classification."*

See Pattey v. Board of County Commissioners, 271 Md. 352, 317 A.2d 142 (1974).

It should also be noted that during the vetoed 2005 Comprehensive Zoning, the subject parcels were granted an RO/Residential Office zone, with the Applicant having requested B2/Community Business District. While it is unfortunate, for a multitude of reasons, that the 2005 Comprehensive Zoning was not enacted, the failure of the subject parcels to receive requested B2 zoning at that time cannot be a factor in favor of either mistake or change. As pointed out earlier, the subject properties are surrounded by a host of differing uses and zones. It is perhaps best that they remain subject to review during a overall, comprehensive analysis. However, the failure of the County to have done so to date is not a mistake sufficient to justify a change in zoning.

CONCLUSION:

For the above reasons, it is recommended that the requested rezonings be denied.

Date: July 10, 2007

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on AUGUST 7, 2007.